IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5431 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

MOHMADHUSAIN AHMEDBHAI MEMAN

Appearance:

Mr. K.P. Raval, A.P.P for Petitioner.

MR YS LAKHANI for Respondent.

CORAM : S.M.SONI,J.

Date of decision: 18/07/96

ORAL JUDGEMENT

Whether bail once granted considering the merits of the case can be cancelled if the same is based on wrong application of provisions of law?

The facts leading to the present petition are as under:

District Superintendent of Police Banaskantha in the course of his yearly inspection at Deesa received

information to the effect that liquor and opium are stored in Lucky Agro Centre situated at ground floor of Pushpak Hotel. On receipt of this information, Deputy Superintendent of Police informed the complainant Police Sub Inspector to do the needful in the same. Accordingly, PSI called two Panchas and searched the said Lucky Agro Centre and opium weighing about 990 gms. was found. The same was seized in accordance with law after following necessary procedure. When the premises was raided and searched one Ganibhai Mohmedhussain was in possession of the premises. On inquiry, it was found that the said premises is let out to the present respondent, i.e. Mohmed Hussain Ahmedbhai Memon and he and his son Ganibhai is carrying on business in the name of Lucky Agro Centre. Both, i.e. Ganibhai and Mohmedbhai were arrested. They filed Misc.Criminal Application no.90 of 1994 for bail before the Additional Sessions Judge, Palanpur, and came to be released on bail by order dated 7th February,1996. The order of release on bail of Ganibhai is not challenged, however, State has moved this Court for cancellation of bail granted in favour of Mohmedbhai.

Mr. Raval, learned A.P.P. contended that the order passed for bail is bad being in contravention of the provisions of Section 37 of the NDPS Act. He further contended that the learned Additional Sessions Judge has foreclosed trial by pre-judging evidence and holding that there are no reasonable grounds to hold accused guilty of offences under NDPS Act. Mr. Raval further contended that bare reading of the order passed by the learned Judge reveals that the order does not satisfy ingredients of Section 37 of the NDPS Act, namely,(1) there are reasonable grounds for believing that he is not guilty of such offence and (2) that he is not likely to commit any offence while on bail. Mr. Raval further contended that considering the nature of evidence and minimum punishment provided for the same there are all the chances either of accused absconding or indulging into the same activity to meet with the quantum of fine that may be imposed in case he is held guilty. The learned Additional Sessions Judge has not considered the bail application from this angle at all, and therefore, this Court should interfere with the order of bail and it should be cancelled. The learned Advocate Mr. Lakhani, appearing for the respondent contended that requirements of Section 37 are not required to be stated in the order, but the same can be read by inference from the reasons assigned by the learned Judge for grant of bail. Mr. Lakhani further contended that the accused may not be available for trial or may indulge into similar offence is not a matter of

inference. In absence of positive evidence to contrary it should be presumed that accused would be available for trial and would not indulge in such activity. The learned Judge has granted bail on considering these aspects in favour of accused. Mr. Lakhani contended that the State has not challenged the order of bail in favour of Ganibhai who was very much present on the premises at the time of raid. The case of the petitioner stands better on facts than that of Ganibhai. Mr. Lakhani contended that the present respondent is an old man, he is on bail since long i.e. from February,1994, he is a businessman and holding some post in his village and he is also holding agricultural land. There is not a single criminal case filed against him. In the circumstances, the order of bail granted should not be interfered with by this Court. Mr. Lakhani also contended that in the judgment rendered by this Court(Coram: S.D.Dave,J.) in Criminal Revision Application no.86/95 with Criminal Revision Application no.87/95 decided on 2nd April, 1996, the Court has taken the view that in the circumstances and situation like one of this case, the Court there had not interfered with the order of bail. Mr. Lakhani, therefore, contended that the bail order should not be interfered with.

The Supreme Court in the case DOLATRAM AND OTHERS VS. STATE OF HARYANA reported in (1995) 1 Supreme Court Cases 349 in paragraph 4 has observed:

" Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly(illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record, of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High

Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non-bailable case, in the first instance, and the cancellation of bail already granted."

Trial Court in the instant case appears to have overlooked the facts relevant for considering bail in nonbailable case. Question is, if such relevant facts are overlooked, would this Couurt, not interfere with the order of bail and cancel it. Is it that, simply because the accused release on bail has not tried to interfere with in any manner with the administration of juustice, this Court should permit to remain illegality. Despite rejection of relevant factors by the trial Court to grant bail, such bail order should not be interfered with?. Will this not amount to permit or condone arbitrary exercise of discretion conferred on the trial Court . Is it that this Court cannot interfere with the order passed in total disregard of statutory provisions concerning bail? Answer to all these questions,in my opinion, is that this Court can and should interfere with such bad orders.

It will be relelvant to state that the Forensic Science Laboratory has opined that the substance found is opium and is a narcotic substance. It is also relevant to state that respondent is alleged to be the tenant of the premises and his son was found present at the time of raid. In view of this fact, there are all the probabilities that he may be held guilty.Thus, there is a strong prima facie case. Keeping in view the minimum punishment of imprisonment as well as fine provided for the offence it can be said that in all probabilities the accused may abscond to avoid evil day and imprisonment or may indulge into such activity again to make good the fine that may be imposed if he is continued on bail.

In DOLATRAM'S case the Court has said that bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. However, when the question of cancellation of bail arose before the Supreme Court in the case of STATE OF MAHARASHTRA VS. ANAND CHINTAMAN DIGHE reported in AIR 1991 Supreme Court 1603 , the Court has held in paragraphs 8 and 9 as under:

"8.The learned Judge further discussed the

statements of witnesses recorded by the Investigating Officer. The Judge scrutinized the statements of Arun Jagtap, Smt. Sangita Khopkar and Miss Sujata Khopkar and treating those statements to be evidence before the Court, came to the conclusion that the statements could not be relied upon. The learned Judge virtually pre-empted the trial by delivering the judgment on the culpability of respondent Dighe. We are of the view that the learned Judge grossly erred in foreclosing the trial by prejudging the evidence which was yet to come on record."

"9.It is no doubt correct that this Court in its order dated January 16,1990 observed that the cancellation of bail was without prejudice to the rights of Dighe to move the Designated Court for bail at any subsequent stage, but that was only in the event of any further evidence being recorded by the Court or any fresh material being made available during the investigation or before the Court. This Court also directed that it was necessary for the Designated Court to consider further material collected by the investigating agency, by recording statements of witnesses. The Designated Court did not record any evidence and there was no fresh material available before the Court. The learned Judge, Designated Court, by putting his own gloss over the same material has again granted bail to the respondent. We do not appreciate the manner in which the learned Judge has dealt with the matter. The police investigation prima facie show that mafia-type terror and fear psychosis was created which led to the cold blooded murder of Shridhar Khopkar. The learned Judge acted illegally in appreciating the statements of witnesses and material collected by the investigating officer at the investigation stage. He should have permitted the evidence to be recorded and thereafter dealt with the same in accordance with law."

Mr.Raval contended that the facts of the present case are identical to that of ANAND CHINTAMAN'S case , and therefore, this Court should interfere and cancel the bail order. Here, in the case on hand, the learned Additional Sessions Judge has appreciated the evidence of the complainant-landlady, and one receipt produced by the prosecution, to show that present respondent is the tenant of the premises. Landlady-Sakinaben has come out with the case that police has not recorded her statement at all. The said landlady has filed one affidavit to the effect that when she declined to police to issue a rent receipt in the name of respondent no.2 , police had approached her rent collector and obtained a receipt

under threat and coercion. Question is how police knew that there is rent collector. When and how landlady knew that police claims that her statement is recorded and denies to have given her statement. The case of the police is that her statement has been recorded wherein she has stated that present respondent is her tenant. Despite the same, she has filed an affidavit to the effect that her statement is not recorded and the police has forcibly taken receipt from the rent collector. Affidavit of the said rent collector ought to have been filed to show that a receipt was collected from him in the name of respondent by threat and coercion. However, the learned Judge appears to have misdirected himself casting burden on the prosecution that they have not recorded the statement of said rent collector Suleman Pirmohmed. While considering application for bail the Court is required to consider the police statements whatever recorded. When the case of the police is that the landlady has given her statement and when the accused files an affidavit of the landlady to the effect that her police statement is not recorded at all, it is a matter to be considered at the time of trial. The Court cannot come to the conclusion at the time of considering application for bail and hold that no such statement of the landlady was recorded and the receipts obtained by the prosecution from the rent collector is by threat and coercion. Based on these facts the learned Judge has come to the conclusion that there is no prima facie case or in other words there are no reasonable grounds to hold that the respondent is guilty of the offence alleged. On the contrary filing of affidavit of a prosecution witness by accused should have been looked upon as tampering with witness. When the learned Judge has misdirected himself in appreciating the evidence in this manner while deciding the application for bail, in my opinion, the learned Judge has exceeded in his jurisdiction by looking into the evidence to which he is not entitled to. Thus, the learned Judge has erred and exceeded in his jurisdiction by prejudging the evidence at the stage of bail application. This is in contravention of the principle laid down by the Supreme Court in ANAND CHINTAMAN'S case.

What is required to be established by the prosecution in NDPS case is that the substance found is a narcotic substance; it is found from possession of the accused. Possession contemplated is always a conscious possession. As per the prosecution case as it stands, when the premises named Lucky Agro Centre was raided, one Ganibhai co-accused was found occupying the same . On further enquiry by the police, the said premises is in

the name of present respondent- father of said Ganibhai. From the statement of other witnesses, it appears that respondent was in the premises just few minutes before the raid. Whether both or one of them was in conscious possession is a matter of evidence. Whether to believe the say of landlady or not is again a matter of appreciation of evidence after cross examination of landlady. However, appreciating evidence at this juncture and accepting the evidence of landlady which is by way of an affidavitwhich ordinarily amounts to tampering with , is prejudging the evidence and is without jurisdiction as held in ANAND CHINTAMAN'S case. Thus, when the order is passed in contravention of certain principles of law which amounts to arbitrary exercise of discretion the same should be interfered with. This apart, when the police says that the stastement of landlady was recorded and the landlady files an affidavit in favour of the accused stating that her statement was not at all recorded, this in my opinion, would amount to tampering with the witnesses also. This also calls for a serious view in such matter. In view of this fact also, in my opinion, the bail is liable to be cancelled.

In view of above discussion, there is prima facie case against the respondent-accused. Section 37 of the N.D.P.S. Act reads as under:

"37.Offences to be cognizable and non-bailable.- (1) Notwithstanding anything contained in the Code of Criminal Procedure,1973(2 of 1974),-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor oppose the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such

offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure,1973(2 of 1974), or any other law for the time being in force on granting of bail."

Here the learned Public Prosecutor is heard and has opposed the bail application. The above discussion on merits suggests clearly that there are reasonable grounds to hold accused guilty of offence. In absence of any material it cannot be said that accused may not repeat the offence. This was a fit case to refuse the bail, yet the same is granted. Thus, the grant of bail is in contravention of provisions of law and is therefore liable to be cancelled.

In view of the above discussion, though the bail is liable to be cancelled in the peculiar facts and circumstances of this case. I would not like to exercise the power of cancellation of bail in this case in view of the following facts, namely:

(i) One who is found in actual possession is released on bail and the same order is not challenged.

(ii) It is stated at the bar that the trial is at the stage of framing charge and may be commenced within a short time.

(iii) That he(the accused) is an old man and is well placed in society as Secretary of one Co-operative Society.

(iv) There is no allegation that accused is not regularly attending court on each remand date and had abused in any manner liberty granted by the Court.

This Court in Criminal Revision Apoplication no.86/95 with Criminal Revision Application no.87/95 decided on 2-4-1996 has taken such a view which reads as under:

" Looking to this feature of the case and the time gap which has developed between the passing of the

orders of bail and the hearing of the present Revision Applications, I am of the view that, when the respondent-accused has behaved and there is absolutely no complaint against him, these are not the fit cases in which, I order the cancellation of bail granted by the Court below. The present Criminal Revision Applications therefore, fail and they are hereby accordingly dismissed. Rule shall stand discharged in both the matters."

It would be improper on the part of this Court to take a different view in the facts and circumstances of this case being identical with that case. Thus, when since about two years, the accused is on bail and nothing adverse has been alleged against him since the release, despite the above position in law, this Court would not like to interfere with the order of bail.

In the result, the petition fails and is dismissed. Rule is discharged.

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